

**STATE OF NEW JERSEY**

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

In the Matter of R.S., Department of  
Transportation

CSC Docket No. 2017-856

Discrimination Appeal

**ISSUED: MARCH 28, 2018**

R.S., an Assistant Engineer Transportation with the Department of Transportation (DOT), appeals the decision of the Deputy Commissioner, DOT, which found that the appellant violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

By way of background, the Division of Civil Rights and Affirmative Action (DCR/AA) investigated allegations by L.S., a female third-party contractor, that the appellant, a male, subjected her to gender discrimination, a hostile work and environment. Specifically, L.S. alleged that the appellant failed to ensure bathroom facilities on the job site and laughed when she informed him that she had to urinate in the woods because of the lack of facilities. Additionally, she alleged that the appointing authority retaliated against her by removing her from the project prior to the anticipated end date after she sought reimbursement for travel to the restroom that was located approximately four miles away from the job site. The investigation substantiated the allegation that the appellant failed to ensure that the contractor procured bathroom facilities for the jobsite which had a disparate discriminatory impact on L.S. Further, it found that a hostile work environment was created since L.S. had to urinate outside in public because of the lack of onsite facilities. The investigation did not substantiate the claim that the appellant laughed when L.S. told him that she had to urinate outside as there were no corroborating witnesses. The investigation also determined that L.S.'s removal from the job site prior to the anticipated project end date was retaliation under the State Policy.

On appeal, the appellant asserts that since L.S. was the project inspector, it was her responsibility as much as his to inform the contractor regarding any issues

at the job site. He presents that he first learned about a lack of bathroom facilities on March 28, 2016 in an email from the contractor to S.E., a female Project Engineer Maintenance, on which he was copied. Further, upon learning of the situation, he immediately phoned the contractor, and as a result, a portable restroom was onsite by April 1, 2016 as confirmed by the supplier's receipt. The appellant denies that he removed L.S. prior to the anticipated end date due to her request for reimbursement for travel to the restroom. Instead, the appellant states that L.S. called out sick on March 28<sup>th</sup> and March 29<sup>th</sup> with only ten minutes' notice and her employer did not provide backup coverage for her which left the DOT vulnerable to issues. He submits L.S.'s timesheet which indicates that she did not work on either March 28<sup>th</sup> or March 29<sup>th</sup>. Further, the appellant submits a March 28, 2016 email from S.E. to the contractor which indicates that L.S. would be reimbursed for her travel to the restroom facility. Additionally, the appellant submits a March 30, 2016 email from S.E. to the contractor which indicates that L.S.'s services would no longer be needed after April 8, 2016 and that the State had the right to remove her pursuant to their contractual agreement. Moreover, the appellant submits an additional investigative report that was conducted by the Assistant Commissioner, Operations, DOT, which supports the appellant's assertions.

In response, the DCR/AA states that even though L.S. was a consultant inspector on the jobsite, it was still the appellant's responsibility as the Resident Engineer (RE) to ensure that the contractor provided bathroom facilities on the jobsite. It states that the appellant was put on constructive notice that the contractor was not in compliance when he failed to request that bathroom facilities were needed even though he visited the jobsite on March 7, 16, and 28, 2016. The DCR/AA presents that according to witness interviews and documentation, the RE is responsible for ensuring that the contractor adheres to special provisions of the contract and it submits the contractual provision which indicates that the contractor shall provide bathroom facilities. Further, the consultant inspector is responsible for making sure that the project conforms to specifications by notifying the RE and then the RE has the ultimate responsibility for addressing deficiencies. However, despite visiting the jobsite three times, on March 7, 16, and 28, 2016, there is no evidence that he instructed L.S. that the special provisions of the project required onsite bathroom facilities. The DCR/AA states that it does not matter that L.S. did not complain about a lack of bathroom facilities until after complaints about payment discrepancies because the appellant had the responsibility of addressing this issue with the contractor.

The DCR/AA further asserts that it did not determine that the appellant retaliated against L.S. Instead, it found that the appointing authority retaliated against her and that the reasons it asserted were used as an excuse to remove L.S. after she filed a discrimination claim. Further, the contract between the appointing authority and the consultant stated that the consultant must be notified in writing

and given time to cure any deficiencies. Additionally, documentation regarding her poor work performance was never provided to support the claim that poor performance was the reason for her removal. The DCR/AA states that although the appellant indicated that L.S. was not measuring properly, there is no evidence that the appellant documented her deficiency.

The DCR/AA states that several witness and communications indicated that the appellant expressed a belief that travel to the bathroom was personal time and that it should not be reimbursed. Moreover, text messages indicated that the subject of traveling to the restroom and the absence of facilities was discussed between L.S. and the appellant. Additionally, several witnesses indicated that jobsites for projects that are less than one month often lack bathroom facilities based on the length of the project. However, the DCR/AA provides that based on a review of the contract and task order it was clear that it was anticipated that this was at least a two-month project and bathroom facilities were not provided until after the project was active for one month. It believes that it does not matter when L.S. asked for reimbursement for her travel expenses to and from the bathroom facilities as it was a violation of the State Policy for there not to be bathroom facilities. As such, L.S. had to either relieve herself outside or travel three miles to bathroom facilities. In this regard, another female third-party contractor witness indicated that not having restrooms onsite is inconvenient for her, but that she had a clause in her contract stating she must be able to get a ride to the restroom and is paid for the time. The DCR/AA asserts that due to anatomical differences between men and woman as well as social mores associated with females urinating in public, the lack of bathroom facilities had a disparate impact on her in violation of the State Policy.

## CONCLUSION

*N.J.A.C.* 4A:7-3.1(a) states, in pertinent part, that the State is committed to providing every State employee a work environment free from prohibited discrimination based on sex/gender.

*N.J.A.C.* 4A:7-3.1(a)1 states that this policy also applies to persons doing business with the State, including at any location that can be reasonably regarded as an extension of the work-place.

*N.J.A.C.* 4A:7-3.1(c) provides that it a violation of this policy to engage in sexual (or gender-based) harassment of any kind, including hostile work environment.

*N.J.A.C.* 4A:7-3.1(h) provides that retaliation against any employee who alleges that he or she was the victim of discrimination/harassment or who opposes a discriminatory practice is prohibited by this policy.

*N.J.A.C.* 4A:7-3.2(i) provides that at the Equal Employment Officer's (EEO's) discretion, a prompt, thorough, and impartial investigation into the alleged discrimination will take place.

*N.J.A.C.* 4A:7.3-2(m)4 states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

Initially, under the State Policy, it is the EEO, which is the DCR/AA in this matter, who has the responsibility to conduct an investigation regarding State Policy claims. Further, under *N.J.A.C.* 4A:7-3.1(g)1, all investigations are to be conducted in a way that respects, to the extent possible, the privacy of all the persons involved. Additionally, complaints are to be investigated in an impartial manner. However, in this case, in addition to the EEO's investigation, the Assistant Commissioner, Operations performed his own investigation. Under the State Policy, complaints are only authorized to be investigated by the EEO. Further, non-EEO investigations place the confidentiality and impartiality of an investigation at risk. Therefore, the Civil Service Commission (Commission) did not consider the Assistant Commissioner, Operations' unauthorized investigative report as evidence to reach its decision. Further, the appointing authority and the Assistant Commissioner, Operations are cautioned that future violations of State Policy investigations may lead to appropriate enforcement action under *N.J.A.C.* 4A:10-2.1.

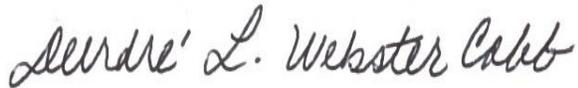
The Commission has conducted a review of the record in this matter and finds that the appellant has not met his burden of proof. It is un rebutted that the appellant was the RE and that he visited the jobsite on March 7, 16, and 25, 2016. As the RE, it was the appellant's responsibility to ensure compliance with the project's contract, including the provision to provide bathroom facilities on the jobsite. Although the job began on March 7, 2017, the required restroom was not provided until April 1, 2016. As determined by the DCR/AA, it does not matter that L.S. did not complain about a lack of bathroom facilities until after complaints about payment discrepancies because the appellant, as RE, had the overall responsibility of ensuring compliance with the project contract. While the Commission is cognizant of the fact that the appellant immediately took action when he learned that there were no onsite restroom facilities on March 28, 2016, because there was no restroom on the jobsite as required by the contract prior to April 1, 2016, L.S. reported that she had to use the woods to relieve herself on March 8, 2016 and subsequently required her to travel over three miles round trip to use restroom facilities off the jobsite. As such, the failure to ensure bathroom facilities were on the jobsite had a disparate impact on L.S. As the DCR/AA did not determine that the appellant retaliated against L.S., the Commission will not address this issue.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON THE  
27<sup>TH</sup> DAY OF MARCH, 2018



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